

(2014) 07 DEL CK 0312
In the Delhi High Court
Case No : W.P. (C) 907/2013

State Farms Corporation of India Ltd.

APPELLANT

Vs

P.S. Gupta

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4, 4(3), 4(5)

Citation : (2015) 213 DLT 95 : (2014) 143 FLR 632

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : G. Joshi, Advocate for the Appellant; A.K. Jain, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the order dated July 13, 2012 of the Controlling Authority under the Payment of Gratuity Act, 1972 (Act in short) whereby the Controlling Authority has allowed the claim of the respondent herein for an enhanced gratuity of Rs. 6,50,000/- along with simple interest @ 10% p.a. from the date it became due to the respondent and the order dated December 13, 2012 passed by the Appellate Authority under the Act whereby the appeal was dismissed.

2. The brief facts are, the respondent was working in the petitioner organization. He retired from the service of the petitioner as Manager (Finance) on December 31, 2007. The payment of gratuity to the respondent was governed by the Act. On the date of retirement, the petitioner paid an amount of Rs. 3,50,000/- to the respondent.

3. On November 26, 2008, the Government of India issued office memorandum recommending therein that ceiling of gratuity would be raised to Rs. 10 Lakhs with effect from January 01, 2007. The said office memorandum primarily deals with revision of pay scales to Board Level and below Board Level Executives and

Non-Unionised Supervisors in Central Public Sector Enterprises with effect from January 01, 2007. The recommendations were on various aspects including gratuity. Under the heading gratuity, the following was recommended:

13. Gratuity; The ceiling of gratuity of the executive and non-unionised supervisors of the CPSEs would be raised to Rs. 10 Lakhs with effect from January 01, 2007.

4. It may be relevant to state here that Clause 3 of the said O.M. deals with affordability for implementation of pay revision. It has been stated under the said clause as under:

The revised pay scales would be adopted, subject to the condition that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax (PBT) for the year 2007-08 of a CPSE in respect of executives as well as non-unionised supervisory staff taken together in a CPSE. CPSE that cannot afford to pay full package, can implement with either part PRP or no PRP. These CPSEs may pay the full package subsequently, provided the dip in the profit (PBT) is fully recouped to the original level.

5. Pursuant to the said recommendations, the petitioner society sent a communication dated January 07, 2009 seeking approval of the Administrative Ministry for pay revision in respect of all the employees. The said communication was favourably accepted by the Administrative Ministry i.e. Ministry of Agriculture vide its communication dated April 21, 2009.

6. The respondent on August 31, 2009 made a request to the petitioner to pay him a further sum of Rs. 6,50,000/- towards enhanced gratuity as per the office memorandum and presidential directives. The petitioner did not accede to the request of the respondent on the ground that he is not entitled to gratuity as per the Act which has already been paid to him. On May 24, 2010, Section 4(3) of the Act was amended and the amount of Rs. 3,50,000/- was substituted by an amount of Rs. 10 Lakhs. The amendment was made effective from May 24, 2010. In the month of October, 2010, the respondent filed a writ petition being WP(C) No. 7146/2010 in this Court for payment of a further sum of Rs. 6,50,000/- towards enhance gratuity as per office memorandum and presidential directive, which was dismissed by this Court on March 16, 2011 granting liberty to the respondent to move to the appropriate authority for redressal of his grievance. Accordingly, the respondent made an application before the Controlling Authority under the Act for payment of a sum of Rs. 6,50,000/- on April 07, 2011. It was the stand of the petitioner before the authority that the claim is beyond time. That apart when the respondent retired from service of the petitioner the maximum limit of gratuity amount payable to him was Rs. 3,50,000/- as per sub section 3 of Section 4 of the Act. Thus the respondent was only entitled to Rs. 3,50,000/- on the date of retirement, which has been duly paid. It was also stated that amendment brought to sub section 3 of Section 4 of the Act has a prospective effect and the respondent could not seek a

retrospective operation of the amendment. The Controlling Authority vide its order dated July 13, 2012 allowed the claim of the respondent thereby declaring that the respondent is entitled to receive an amount of Rs. 6,50,000/- after deducting a sum of Rs. 3,50,000/- already received with interest of 10% p.a. from the date the gratuity became payable. It may be noted here that insofar as the plea of limitation is concerned, the same was decided against the petitioner inasmuch as the Controlling Authority condone the delay in filing the application. On merit, the Controlling Authority relied upon the recommendations of the Pay Revision Committee of the Department of Public Enterprises, which were notified vide O.M. dated November 26, 2008 wherein the ceiling limit of gratuity was enhanced from Rs. 3.5 Lakhs to Rs. 10 Lakhs. The Controlling Authority was of the view that the said recommendations have been approved by the Board of Directors and the Administrative Ministry. It also noted that the respondent had received payment of arrears of revised pay and allowances so also encashment of leave. The Controlling Authority was further of the view that the presidential directive is as good as any other law and it is binding on all concern.

7. Against the said order, the petitioner herein filed an appeal before the Appellate Authority under the Act. It was the case of the petitioner before the Appellate Authority that the Board of Directors of the petitioner corporation although approved revised pay scales with effect from January 01, 2007 but did not approve enhancement of amount of gratuity to Rs. 10 Lakhs from Rs. 3.5 Lakhs as per the recommendations in the said O.M. of November 26, 2008. It was also stated that the approval sought by the petitioner corporation from its administrative ministry was only with respect to pay revision and not with respect to enhanced gratuity and accordingly, the presidential directive in terms of the Ministry of Agriculture on OM dated April 21, 2009 was only with respect to revision of pay scales. Further upon amendment to sub section 3 of Section 4 of the Act and the Board of Directors of the petitioner enhanced the amount of gratuity to Rs. 10 Lakhs with effect from May 24, 2010. The respondent having retired on December 31, 2007 would be entitled to the gratuity to the extent of Rs. 3.5 Lakhs.

8. The Appellate Authority relying upon Section 4(5) of the Act which stipulates nothing in the Act shall effect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer, was of the view that an award has the force of law, so also a presidential directive issued on April 21, 2009 by which the ceiling limit of gratuity was enhanced with effect from January 01, 2007 and which have a very clear purpose of extending the said benefit to the employees whose employment has come to an end between January 01, 2007 and April 21, 2009 depriving the said benefit to the respondent would defeat the very purpose of presidential directive. The Appellate Authority dismissed the appeal.

9. Mr. G. Joshi, learned counsel for the petitioner would state that O.M. dated November 26, 2008 is very clear inasmuch as substantively the said O.M. dealt

with pay revision. He would state, even though the aspect like ceiling limit of gratuity was recommended to be enhanced to Rs. 10 Lakhs with effect from January 01, 2007 but that is only if the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax for the year 2007-08. He would state that if the concerned Central Public Service Enterprise (CPSE) cannot afford to pay full package can implement with either part PRP or no PRP. It was his contention that the O.M. also contemplated concerned CPSE may pay the full package subsequently provided the dip in the profit is fully recouped to the original level. According to him, the O.M. itself gave liberty to the concerned CPSE to determine the benefit of full package at the discretion of the concerned implementing authority. It was also his contention that in the case in hand the petitioner had only sought the approval of the administrative ministry i.e. Ministry of Agriculture to the extent of pay revision with respect to all employees as the total financial implication put together for IDA Scale/CDA Scale worked out to Rs. 3.1 Crores, which was within affordability limit. He would state that the petitioner had not calculated the financial implication of enhanced gratuity. In any case according to him, it was not part of Rs. 3.1 Crores. I may point out here that during the course of submissions, I have called upon the petitioner to place before this Court decision of the Board of Directors with regard to the proposal approved by it, to be sent to the Ministry of Agriculture for its approval. Accordingly, the petitioner had filed the Agenda Item No. 16 along with Annexure-II which is the minutes of meeting of the members of the committee of officers and union representatives and statement showing pay structures of the IDA pay scales. He would state that the presidential directive dated April 21, 2009 was also with regard to the pay revision and nothing more. It is his submission that the authorities below have totally misinterpreted the presidential directive to mean that enhanced gratuity was also to be granted. He has stated that the petitioner had granted the benefits as recommended and notified vide O.M. dated November 26, 2008 from different dates, for example the revision of basic pay plus D.A. was given with effect from January 01, 2007; transport allowance with effect from November 26, 2008; HRA with effect from November 26, 2008; perks @ 30% with effect from April 01, 2011 and 40% with effect from October 01, 2012; PRP 2011-12; company car and leased accommodation have not been granted. He would rely upon the judgment of the Supreme Court reported as 2001 SCC (L&S) 942 Sheetla Sharan Srivastava & Ors. vs. Government of India & Ors.

10. On the other hand, Mr. A.K. Jain, learned counsel for the respondent would submit that the payment of gratuity to the respondent is regulated by the Act. He would state that in terms of Section 4(5) if a better benefit of gratuity is being given, the same cannot be denied. In other words, the Act itself contemplate a better benefit beyond the ceiling of Rs. 3.5 Lakhs, can be granted. He would state that the O.M. dated November 26, 2008 is a composite O.M. notifying several benefits including the gratuity. The presidential directive vide O.M. dated April 21, 2009 clearly stipulated that the effective date of

implementation of other benefits shall be as per O.M. dated November 26, 2008, February 09, 2009 and April 02, 2009. He has stated that vide O.M. dated April 21, 2009 the Ministry of Agriculture was conscious of the fact that the employees of the petitioner organization are entitled to other benefits in terms of the recommendations dated November 26, 2008. It is precisely for that reason, the presidential directive dated April 21, 2009 has observed that the same shall be in terms of the aforesaid O.Ms. The O.M. does not stipulate any pre-condition for grant of enhanced gratuity. He had further stated that the financial implication, if the benefit of enhanced gratuity is given to the employees who retired as on January 01, 2007 and thereafter, is around Rs. 25 Lakhs which would be within the limit permissible in terms of the O.M. dated November 26, 2008. He would rely upon the judgment of the Madras High Court in the case decided on March 25, 2010 in Writ Appeal No. 1341/2007 and connected writ petitions Neyveli Lignite Corporation Ltd. vs. Appellate Authority & Ors. in support of his contentions. He would also submit that other Central Public Sector Enterprises have granted the benefit of enhanced gratuity with effect from January 01, 2007. In this regard, he named National Seeds Corporation Ltd., Food Corporation of India.

11. Having considered the submissions made by the learned counsel for the parties, I note that the O.M. dated November 26, 2008 is very clear. The said O.M. was issued pursuant to the recommendations made by a Committee under the Chairmanship of Justice M. Jaganadha Rao (Retired Judge of Supreme Court of India), wherein the substantive issue was with regard to pay revision of the employees of the Public Sector Undertakings. The O.M. also notifies other benefits. What is of importance is clause 3 and clause 17, which I reproduced hereunder:

3. Affordability for implementation of pay revision:-

The revised pay scales would be adopted, subject to the condition that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax (PBT) for the year 2007-08 of a CPSE in respect of executives as well as non-unionised supervisory staff taken together in a CPSE. CPSE that cannot afford to pay full package, can implement with either part PRP or no PRP. These CPSEs may pay the full package subsequently, provided the dip in the profit (PBT) is fully recouped to the original level. X X X X

17. Issue of Presidential Directive, effective date of implementation and payment of allowances etc.:

The revised pay scales would be implemented by issue of presidential directives in respect of each CPSE separately by the concerned administrative ministry/department. The revised pay scales will be effective from 01.01.2007. The payment of HRA, perks and allowances based on the revised scales will, however, be from the date of issue of Presidential Directive. The Board of Directors of each CPSE would be required to consider the proposal of pay revision based on their

affordability to pay and submit the same to the administrative ministry/ department of approval. The concerned administrative ministry with the concurrence of its financial advisor will issue the Presidential Directive. A copy of the Presidential Directive issued to the CPSEs concerned may be endorsed to the Department of Public Enterprises.

12. The question which needs to be answered is that the affordability has to be seen with regard to the pay revision only or with regard to other benefits including gratuity. The answer is with regard to every benefit. This I say so on the basis of clause 3 of the OM dated November 26, 2008 which stipulates, the revised pay scales would be adopted subject to the condition that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax for the year 2007-08 of CPSE. It is qualified by further stipulation that if the CPSE cannot afford to pay full package, can implement with either part PRP or no PRP. The CPSE may pay full package subsequently provided that the dip in the profit is fully recouped to the original level.

13. In other words, the discretion is vested with the concerned CPSE, depending upon its percentage of profit but not more than 20% dip in 2007-08 to implement the pay revision. So also, the full package. If the concerned CPSE cannot afford any benefit, it can defer the benefit(s) to a subsequent date when the dip in the percentage of profit is fully recouped to the original level. Meaningfully read, the question of package depends upon the affordability. It is noted from the agenda note put up for consideration of the Board of the petitioner company, a reference is made to the discretion vested with the concerned CPSE. Unfortunately, I note, the affordability has been considered only with respect to the revision of pay scales and not with regard to other benefits including the gratuity. It was expected from the Board to consider the affordability of each benefit, at least, those to be given from 01.01.2007, keeping in view the parameters laid down in OM dated November 26, 2008.

14. Be that as it may, it is also noted that during the pendency of the writ petition, this Court on February 15, 2013 passed a detailed order, the relevant portion of which is reproduced as under:

One of the submissions of learned counsel for the petitioner is that on the aspect of affordability, the office memorandum dated 26.11.2008 provided that the pay revision shall be implemented subject to the condition that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in Profit before Tax (PBT) for the year 2007-08 of a CPSE in respect of executives as well as non-unionised supervisory staff taken together in a CPSE. It further provides that CPSE that cannot afford to pay full package, can implement with either part PRP or no PRP. It provides that these CPSEs may pay the full package subsequently, provided the dip in the profit (PBT) is fully recouped to the original level.

The submission of the petitioner is that the petitioner had made a specific averment in this regard in the communication dated 07.01.2009 addressed to the Director (Seeds) in paragraph 4. The said averment, insofar as relevant, is to the effect that in the year 2007-08, the petitioner has earned Net Profit of Rs. 12.29 Crores and the Profit Before Tax is Rs. 17.04 Crores. It is disclosed that the permissible dip is Rs. 3.4 Crores, whereas the annual financial burden is Rs. 2.2 Crores for I.D.A. scale employees and Rs. 0.9 Crores for C.D.A. scale employees. It is stated that the total financial implication put together works out to Rs. 3.10 Crores.

According to the learned counsel for the petitioner, while computing the aforesaid figures, the dip in the Profit Before Tax did not include the element of gratuity.

Learned counsel for the petitioner also refers to the submission made on page 6 of the petition in its synopsis and list of dates to the effect that there would be 50 employees, who would raise a demand and be entitled to payment of additional gratuity in terms of the Office Memorandum and Presidential Directive issued by the Government of India and the additional burden of gratuity alone would be to the tune of Rs. 3 Crores.

On the other hand, the submission of learned counsel for the respondent is that this submission was not even raised before the Controlling Authority or the Appellate Authority.

Without prejudice to the rights and contentions of the parties, I consider it appropriate to direct that the Controlling Authority should, before the next date, make a report with regard to the financial outgo and the dip in the Profit Before Tax in the year 2007-08, if the element of gratuity is also taken into account. For this purpose, the petitioner shall produce all the relevant evidence and record before the Controlling Authority, including that the Controlling Authority may direct the petitioner to produce. The Controlling Authority shall also examine the aspect-Whether the petitioner can pay the full package on account of its profits in the subsequent years, as provided in the last paragraph 3 of the Office Memorandum dated 26.11.2008. The petitioner shall produce the status of its Profit Before Tax in the subsequent years before the Controlling Authority. The Controlling Authority shall also hear the parties on this aspect before making the report.

It has been made clear to the petitioner that in case it is found that the objections to the payment of the additional gratuity by the petitioner is meritless, the petitioner shall be subjected to heavy costs for wasting not only the time of this Court, but also that of the Controlling Authority.

It would, therefore, be advisable that the petitioner carries out an in-house exercise at the earliest, and if it is found that the additional gratuity is payable to the employees, who retired on or after 01.01.2007 and before 24.05.2010 in terms of the Office Memorandum dated 26.11.2008, the petitioner should make a statement to that effect and withdraw the writ petition.

15. Pursuant to the order dated February 15, 2013, the Controlling Authority has produced its report in a communication to the Registrar of this Court dated May 10, 2013. I note from the report that the Controlling Authority, after giving opportunity to both the parties and holding discussions, framed two issues. The findings on the said issues are reproduced hereunder:-

Issue No. 1.

So far dip in PBT of 2007-08 as an effect of payment of the element of enhanced gratuity is concerned, it is only 0.06 crores as shown in the table above. At the same time, it is relevant to mention that though there is no actual outgo and dip in the PBT of 2007-08 as consequence of pay revision if it is calculated it comes to Rs. 3.97 crores. Further, if the total effect of pay revision is considered alongwith enhanced element of gratuity it comes to Rs. 4.03 crores i.e. 22.98 % of the PBT for 2007-08. The sole effect of dip of enhanced amount of gratuity i.e. 0.06 crores is only 0.34% of PBT. It is pertinent to mention that the calculations are based on factual data but its outgo has not taken place in the Accounting year 2007-08.

Issue No. 2

If the financial data shown in the form of table above is examined with the aspect of financial burden due to pay revision, a look into the PBT for the year 2008-09 shown as 17.04 crores is after making provision of approximately 12 crores for payment of arrears etc. of pay revision excluding payment of gratuity upto 3.5 lacs to the retiring employees for the period for 2006-07, 2007-08, 2008-09, the provision of which is already taken separately in the Accounts. Obviously the PBT of 2009-10 will cater only the burden of such consequence of pay revision for the year 2009-10 only which comes to Rs. 4.23 crores whereas PBT is 39.28 crores. The effect of pay revision in the year 2009-10 is only 9.72% of the PBT of 2009-10 whereas the effect of enhanced gratuity, if paid in the year 2009-10 is 0.41%. If both the effects are added back it comes to 10.13%. Obviously if a dip in the year 2009-10 due to the pay revision is considered, still SFCI is in a position to allocate approximately 10% of the PBT of 2009-10 which comes to Rs. 3.9 crores.

Here we have to examine whether the consequential dip of pay revision in the PBT of 2007-08 can be recouped in the subsequent years or not? The available balance of PBT within the permissible limit of 20% is quite sufficient and in this year the additional dip of approx. 2.98% in the year 2007-08 may be recouped easily.

Therefore, I am of the considered opinion in the facts and circumstances that the petitioner and non-applicant can pay the full package on account of its profit in the subsequent years as provided in the last part of para 3 of OM dated 26.11.08 so far enhanced amount of gratuity is concerned.

16. From the above, it is clear that the available balance of profit before tax was

within the permissible limit of 20% which is sufficient and the additional dip of approximately 2.98% in the year 2007-08 may be recouped, and the enhanced gratuity could be paid in terms of the OM dated November 26, 2008. I am conscious of the fact that the aforesaid report of the Controlling Authority is conclusive in favour of the respondent, but the same need to be considered by the petitioner. The decision on grant of any benefit need to be taken by the concerned CPSE, more particularly, when affordability need to be seen. Further, this Court would restrain itself from forming an opinion on the report. In the fitness of things, it would be appropriate for the Board of the petitioner organization to consider the report submitted by the Controlling Authority and take a view on the payment of enhanced gratuity to the respondent herein. This I say so, more particularly, in view of my conclusion above that the affordability of grant of enhanced gratuity was not at all considered by the Board before sending the case for approval of the Ministry of Agriculture. If the Board is of the view that the enhanced gratuity is affordable, then the same shall be paid to the respondent in terms of the directions of the Controlling Authority, including interest as granted by him, after seeking the release of the amount as stood transferred to this Court pursuant to the order of this Court dated October 11, 2013. The aforesaid directions shall be implemented by the petitioner within a period of three months from today. In the eventuality, the decision of the Board is against the payment of enhanced gratuity to the respondent, the respondent shall be at liberty to revive this petition by filing appropriate application.

17. The writ petition stands disposed of.